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PERFORMANCE-BASED SERVICE ACQUISITION (PBSA), A-76 AND PERSONAL SERVICES— A CAUTIONARY NOTE

EDWARD ALLEN FRIAR

The concurrent emphasis on acquiring services using Performance-Based Service Acquisition (PBSA) and the new A-76 competitive sourcing procedures gives rise to some potentially conflicting goals that acquisition personnel need to be aware of in order to avoid personal service contracts. A contract for services can become a personal services contract either by the way it is written or by the way it is administered, but proper training and planning can help avoid this pitfall. Acquisition and contracting personnel need to be informed about what constitutes personal services and aware of this limitation as it applies to managing PBSA contracts. This article seeks to further define personal services and offers some suggestions for consideration when writing a performance work statement (PWS) or statement of objectives (SOO) for a PBSA.

The Department of Defense (DoD) now buys more services than goods and this trend is expected to continue into the foreseeable future (Gansler, 2001). All executive departments are required to use Performance-based Service Acquisition (PBSA) to the maximum extent when acquiring services (Federal Acquisition Regulation [FAR], 2004, 37.102, p. 831). The President has directed all executive departments to contract out commercial services using the Office of Management and Budget's (OMB) Revised Circular A-76, May 29, 2003, which outlines procedures designed to subject commercial activities performed by government

personnel to the forces of competition thereby ensuring taxpayers get maximum value for their tax dollars (Office of Management and Budget [OMB], 2003). As of 2003, more than 850,000 government jobs have been identified under the Federal Activities Inventory Reform (FAIR) Act as commercial.

The Federal Acquisition Regulation (FAR) at Part 37.104 has long prohibited personal services contracts, and the previous Circular A-76 also stated that the Circular "did not authorize contracts which establish an employer-employee relationship between the government and contractor employees," i.e., personal services (OMB, 1983, Para. 7(c) (5)). This language has been removed from the revised Circular A-76, but any contract awarded as a result of this process would still be covered by the FAR, which prohibits personnel services contracts. Now with the increasing emphasis on competitive sourcing of government jobs using performance-based contracting methods that allow only the statement of the outcome or goals to be achieved under the contract, there is an increased potential for violating the prohibition against contracting for personal services. Acquisition and contracting personnel need to be informed about what constitutes personal services and aware of this limitation as it applies to managing PBSA contracts.

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According to FAR 37.104, "personal services contracts are characterized by the employer-employee relationship they create between the government and the contractor personnel" (FAR, 2004, 37.104(a), p. 832). "Agencies of the federal government are not allowed to award personal services contracts unless specifically authorized by statute (5 United States Code [U.S.C.] 3109) to do so" (FAR, 2004, 37.104(b), p. 833). But what actually constitutes an employer-employee relationship and thus personal services? The FAR says an employer-employee relationship is created when the service contract's terms, or the manner of the contract's administration, subject contractor personnel to relatively continuous supervision and control of a government officer or employee. Merely ordering a specific performance or result, with the right to accept or reject the work, is not that type of supervision (FAR, 2004). Each contract is to be judged on its own merits

with the primary question being: Will the government exercise relatively continuous supervision and control over contractor personnel performing the contract (FAR, 2004)?

In FAR 37.104(d) there are some descriptive elements that should be used in assessing whether or not a proposed contract is for personal services, these include:

1. Is performance on site? (i.e., on a Government Installation)
2. Are the principal tools and equipment furnished by the government?
3. Are the services being performed by the contractor directly related to the accomplishment of the agencies assigned mission or function?
4. Are comparable services being performed in the same agency by civil service personnel?
5. Will the need for this type service be expected to last beyond 1 year?
6. Does the nature of the service being provided reasonably require government direction or supervision of contractor employees in order to adequately protect the government's interest, retain control of the function involved, or retain personal responsibility for the function by a duly authorized Federal officer or employee? (FAR, 2004, 37.104(d), p. 833)

If you have a services contract with some of these elements then you potentially have a personal services type contract. You need to proceed with caution, re-evaluate your performance work statement (PWS) or statement of objectives (SOO) to ensure that government personnel will not be directing or supervising contractor employees in order to accomplish the contract performance requirements. In 1999, the General Accounting Office (GAO) denied a protest from Encore Management Company (see B-278903.2) over the cancellation of a solicitation for clerical and administrative support services where the government agency's actual requirement was for personal services. As stated in the decision, "Although the incumbent contract started off small and included temporary, short term positions for a limited portion of the agency, the requirements quickly grew into requirements for permanent clerical and administrative positions throughout the agency. The contractor's personnel in these positions worked at the agency's offices alongside government employees performing the same or similar work and using government supplies and equipment. Government managers supervised contractor personnel by directing, reviewing, and approving their work" (GAO, 1999, p. 4).

The GAO went on to say that cancellation of this solicitation was reasonable and proper because, "the agency no longer needs temporary personal services for short term positions; rather, the only purpose of this contract is to satisfy the agency's needs for full time permanent staff" (GAO, 1999, p. 4). The point here is that simply because an agency has a need for additional manpower that is commercial in nature does not relieve the agency from the prohibition on contracting for personal services.

Although, the new A-76 process does not specifically prohibit the awarding of personal services contracts, the implication would seem to be that *personal services* would not be permitted unless they fall under one of the exceptions allowed in the FAR or in other law. It is up to the contracting officer and performance work statement team to ensure that the PWS/SOO does not contain personal service requirements. Contracting personnel should use the guidance in FAR 37, as discussed above, in determining if the solicitation contains requirements for personal services. If it does, they should be deleted or rewritten to make them non-personal services.

For example, in a recent opinion by the Chief Counsel of the Legal Office, U.S. Army Communications and Electronics Command (CECOM), it was determined that, "it appears that contracting for administrative or secretarial services traditionally provided by the Legal Office support staff would be difficult since obtaining those services from contractor personnel without relatively continuous supervision does not appear feasible" (Szymanski, 2001, p. 5). Not only would the inherent nature of this service require *continuous supervision*, but this is an on going requirement expected to last more than one year, the work would be performed on-site, the principal tools and equipment would be furnished by the government, and comparable services are performed in the agency using civil service employees. A-76 is about competitive sourcing not about filling government employee's chairs with contractors.

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Although it may seem fairly straight forward to determine if a service is personal or not, that is only half of the problem. The other half that needs to be considered is how the contract will be administered. The best written performance work statement for non-personal services may be converted to personal services by the way the contract is administered. As indicated above in the Encore Management case, when the government, during contract administration, directs or supervises contractor employees over a sustained period of time, a personal service contract may be formed. According to Steven Schooner, at George Washington University Law School, this has been a problem in another way; "workforce reductions and outsourcing pressures have conspired to increase the government's reliance on personal services contracts, under which the government retains the function, but the contractor employees staff the effort. Under such contracts rather than using a performance-based approach, agencies all too often merely purchase labor" (Schooner, 2004, p. 73).

As competitive sourcing continues, and even accelerates, it is sometimes easy to forget that replacing government workers with contractors means more service contracts and good service contracts have historically been hard to write (Schooner, 2004, p. 70).

However, as Mr Schooner has also pointed out, "Competitive sourcing depends on skilled professionals planning, competing, awarding, and managing sophisticated long term service contracts. But despite mandates to contract out government functions, the administration placed no concurrent emphasis on retaining or obtaining suitable acquisition personnel" (Schooner, 2004, p. 73). In fact, at the same time agencies are being told to complete more jobs they are also being told to use performance-based contracting for acquiring these services with no subsequent increase in training or personnel.

The principal objective of PBSA is to state the government's requirements in terms of performance objectives or outcomes desired rather than the method to be used in performance.

The principal objective of PBSA is to state the government's requirements in terms of performance objectives or outcomes desired rather than the method to be used in performance. The problem here is that this is easier said than done. Acquisition personnel need experience and training in order to write effective PWSs, and many times a team may only work on one A-76 study in their career. In a 1999 study entitled, *A Plan to Accelerate the Transition to Performance-based Services*, Frank Anderson, now President of the Defense Acquisition University (DAU), recognized that, "All participants in service acquisitions including the requirements developers, the contracting personnel, the program manager and the quality assurance and contract administration personnel should be involved in team structured training" (Anderson, 1999, p. 47). Training may indeed be the key to successful performance-based service contracting, and the earlier in the process they get this training the better. Both DAU and the Army Logistics Management College (ALMC) now offer training in PBSA. To find out more about this training you can go their Web sites at www.dau.mil or www.almc.army.mil. Other government agencies, the National Contract Management Association (NCMA) and a number of private sources also offer training in PBSA.

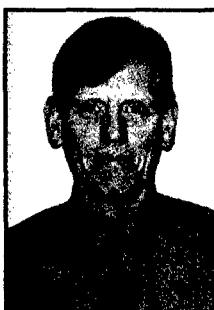
The PWS is the foundation on which effective and efficient contract performance is built, and writing a good one is not easy. Training and experience can obviously help in this process, and there are a number of online resources as well as formal classes available. Here are some suggestions taken from the Defense Logistics Agency's (DLA) *Commercial Activities Guidebook*. The PWS should describe all requirements that must be met in clear concise wording. Key elements of the a PWS include a statement of the required services, where performance is to take place, the period of performance, measurable performance standards, and the acceptable quality level or allowable error rate (Defense Logistics Agency [DLA], 2004, pp. 5-4, 5-5). The PWS

will become Section C of the solicitation and should also include general information the contractor needs to know, Government Furnished Property (GFP) or services that will be provided, and quality control requirements. The PWS team will also develop a Quality Assurance Surveillance Plan (QASP) that describes the procedures the government will use to monitor contract performance. The primary focus of the QASP is to ensure the service provider's quality control program is working and that they are meeting the requirements of the PWS. Quality management responsibility is on the service provider not the government. The government should be primarily concerned with checking the service provider's quality control program.

Although the PWS team usually writes the PWS, the contracting officer is ultimately responsible for it. They should ensure that the services are not personal, that the services can be procured in the market, and the contract can be administered so that government direction or supervision of contractor employees will not occur. They also should ensure the involvement of the PWS team including the requiring activity and the competitive sourcing official in the final review of the PWS (DLA, 2004, p.5-5, 5-6).

With the confluence of PBSA and the new A-76 competitive sourcing initiatives, the need for team training is more important than ever to insure that the objectives of one program do not override the requirements of the other. It is also important to understand, as stated in step seven of *Seven Steps to Performance-based Services Acquisition*, "there is a growing realization that the 'real work' of acquisition is in contract management" (Office of Federal Procurement Policy [OFPP], 2004, p. 37). In service acquisition, contract management is a "mission critical agency function" (OFPP, 2004, p. 37).

For this reason, the acquisition team should be organized early, represent all interested parties, be trained and motivated to have a successful contract. Although it is hard for contracting people to swallow sometimes, there is some truth to the statement that, "Contract award is not the measure of success or even an especially meaningful metric" (OFPP, 2004, p. 38). Effective and efficient contract performance is the true measure of a successful contract—and this success, to a large extent, depends on the experience, training, and motivation of the acquisition workforce.



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